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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1053

OKEECHOBEE COUNTY, FLORIDA,
Petitioner,

vs.

JOHN NUVEEN AND JOHN NUVEEN, JR., AS CO-PARTNERS, DOING BUSINESS UNDER THE NAME OF JOHN NUVEEN & COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MILLER WALTON,
Counsel for Respondents.

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The jurisdiction of the District Court was founded solely on diversity of citizenship and amount in controversy (R. 1). Therefore, it is a question of Florida law, exclusively, whether or not the third party injunction restraining the County from performing the refunding agreement rendered performance by Nuveen a legal impossibility. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; *Ruhlin* v. *New York L. Ins. Co.*, 304 U. S. 202; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *West* v. *American T. & T. Co.*, 311 U. S. 223; *Six Companies of California* v. *Joint Highway Dist.*, 311 U. S. 180. For that reason, if the decision conflicts with decisions

in the Sixth and Seventh Circuits, as asserted in the Petition (p. 8) and accompanying Brief (p. 14), such conflict is not, in this case, a ground on which certiorari should be granted. *Ruhlin* v. *New York L. Ins. Co., supra; Davies Warehouse Co.* v. *Bowles*, 321 U. S. 156.

The Petition admits, and rightly so, that there is no Florida decision in point (p. 7). Consequently, by deciding as they did, the District Court and the Court of Appeals each necessarily decided that the law they applied probably is the law of Florida; that the Florida Courts probably would have applied it had they been deciding the question. *Helvering* v. *Stuart*, 317 U. S. 154; *Meredith* v. *City of Winter Haven*, 320 U. S. 228. The Petition makes no showing to the contrary, and impliedly admits inability to demonstrate the probability of any other conclusion ever being reached by the Florida Courts, on like facts.

The District Judge practiced in Florida for many years, and has been presiding in and applying the law of that State for approximately ten years. Circuit Judge Waller, who concurred (R. 129) in affirming the Judgment, resides in Florida, was a prominent attorney who practiced there for years, and was formerly a District Judge in that State. Both are exceptionally well qualified, by background, training and experience, to exercise informed judgment as to the law the Florida Courts probably would apply to facts on which there is no Florida decision in point. The Petition merely seeks to have this Court consider whether or not it will arrive at some other conclusion on that question, and substitute its judgment for theirs, but shows no good reason for any such exercise of jurisdiction. *Helvering* v. *Stuart, supra; Meredith* v. *City of Winter Haven, supra.*

The cases cited in the Petition and accompanying Brief are not in point. Many did not involve the question whether or not an injunction restraining the performance of a con-

tract is an act of the law rendering its performance a legal impossibility. Those which did decide that question are readily distinguishable, on both facts and principle. They are cases in which an action or suit was brought or defended by the person enjoined, his claim or defense having been that because he was enjoined from performing he should be relieved of obligation or should not be held answerable in damages. 5 *Page on Contracts*, § 2702.

Here the impossibility of performance by Nuveen resulted from the fact that the other party to the contract was restrained from performing it (R. 117-119). The injunction restrained the County from validating or issuing the proposed refunding bonds, and from retiring the outstanding bonds by call for redemption (R. 117-119). Since the County could not perform those acts, there was no way in which Nuveen could assist in their performance (R. 117-119). The ability of Nuveen to assist was dependent on action by the County (R. 117-119). Nuveen could not assist when the County could not act (R. 117-119).

The rule of reason and common sense is that the injunction against the County rendered the dependent performance of Nuveen a legal impossibility. That must have been one reason why, lacking any Florida decision in point, both the District Court and the Court of Appeals relied on *Moller* v. *Herring*, 5 Cir., 255 F. 670, 3 A. L. R. 624, as stating the principles that the Florida Courts probably would have applied to the facts.

The cited case relies on and follows *Malcomson* v. *Wappoo Mills*, C. C., S. C., 88 F. 680, in which the Circuit Judge followed, as the more equitable doctrine, the decision of the New York Court of Appeals in *People* v. *Globe Mut. L. Ins. Co.*, 91 N. Y. 174, holding that the action of the Court rendered the contract impossible of performance, and refused to follow the New Jersey Chancery Court in *Spader* v. *Manufacturing Co.*, 47 N. J. Eq. 18, 20 A. 378, taking the

opposite view. By following *Moller* v. *Herring, supra*, the District Court and the Court of Appeals each decided that probably it is the law of Florida, and the Petition fails to give any reasonable basis for asserting that it is not. *Helvering* v. *Stuart, supra; Meredith* v. *City of Winter Haven, supra.*

The following statement in the Petition (p. 8) misconstrues the decision of the District Court:

> "The District Court, in determining as a matter of law that the callable issue of bonds (dated June 1, 1940), had to be called simultaneously with the sale and delivery of the new Refunding Bonds is contrary to many Florida decisions precisely on point."

The corresponding statement and argument in subdivision "D" of the Brief (p. 15-17) also misconstrue the decision. The District Court made no such determination, nor was any such determination made by the Court of Appeals. Instead, the District Court found:

> "And when the injunction was dissolved the plaintiffs were not deprived of insisting on their rights under the War Clause of the contract" (R. 116).
>
> "When the injunction was lifted in June, 1942, there was not an opportunity between that date and the expiration date of the contract, August 8, 1942, within which Nuveen could have performed. This is so because the bonds which were the subject matter of the proposed purchase had to be called according to their contract, and they could not have been called between June 1, 1942, and August 8, 1942" (R. 119).
>
> "A state of War existed after December 7, 1941, and exists even to this date. That fact alone is sufficient answer to defendant's fourth contention, as to all time after December 7, 1941" (R. 119).

The Court of Appeals summarized these findings by saying the District Judge thought "that when the injunction

was finally dissolved, the conditions were such as to excuse plaintiffs from performance" (R. 133). And the Court of Appeals found (R. 134-135):

> "Through no fault of plaintiffs but because of an injunction preventing the county from going on with the refunding contract, the county and plaintiffs were not able to bring the contract to completion until after the United States had become involved in War. When then the injunction was dissolved many months afterwards, plaintiffs were unwilling to comply, and defendant was not in a position to demand compliance, with the important terms of the contract that plaintiffs advertise a public sale and at that sale bid for the bonds a price of 103 and interest. The contract having thus become impossible of performance without fault on plaintiffs' part, plaintiffs became *ex aequo et bono*, entitled to a return of the deposited funds, and the judgment ordering their return was right."

There was no decision, by either the District Court or the Court of Appeals, that the outstanding callable bonds "had to be called simultaneously with the sale and delivery of the new Refunding Bonds," nor was it necessary for either Court to consider or decide that question. The resolution authorizing the issuance of the refunding bonds expressly provided that they could not be sold and the proceeds of the sale be deposited for the purpose of calling the outstanding bonds, "on a date earlier than ninety days prior to the date fixed for the redemption of the bonds to be paid with such proceeds" (R. 70). August 8, 1942, the day on which the refunding agreement expired by its terms, was a date more than ninety days prior to December 1, 1942, the earliest day, after the dissolution of the injunction, on which the outstanding bonds could be called. Consequently, the consummation prior to August 8, 1942, of a sale of the refunding bonds, would have violated the resolution authorizing their issuance, and the bonds would have been invalid.

Argument is not needed to demonstrate that the contract could not and did not require Nuveen to purchase invalid bonds.

For the reasons stated, counsel urges that the Petition is not well founded, and should be denied.

Respectfully submitted,

MILLER WALTON,
Counsel for Respondents.

WALTON, HUBBARD, LANTAFF,
ATKINS & CARSON,
1312 Congress Building,
Miami 32, Florida.

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